Neither of these cases, however, support the argument on behalf of the respondent. To prohibit the use of loud speakers and gramophones in close proximity to offices and business premises does not appear unreasonable or unfair; and further, I see no uncertainty in regard to this by-law. Nuisance is not defined, but it has a well known meaning in law and, so far as this by-law is concerned, may be defined as

> "an inconvenience materially interfering with the ordinary comfort physically of human existence. (Walker v. Selfe, 20 L.J. Ch. 435)".

For the above reasons it is clear that this appeal must succeed. The Magistrate should have inflicted some penalty on the respondent after the latter had pleaded guilty.

The only doubt I had in this case was to decide in what form the appeal should be allowed, for there was no material on the record to indicate the seriousness or otherwise of the offence. To order a new trial in view of the respondent's plea would be most inappropriate, and it appears unnecessary to send the case back to the Magistrate with directions to record a conviction.

Taking all the circumstances into account, I think the proper order to make is to find the respondent guilty of the offence with which he is charged, and to inflict a fine of one dollar or in default 3 days rigorous imprisonment. I impose a nominal fine for, as previously stated, there is nothing in the record to indicate that the respondent habitually disregarded the provisions of the by-law in question, or did so after complaints had been made.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) AND GORDON-SMITH, Ag. J.A. (MALAYA).

August 22, 1939.

LIEW NGUN YIN (f) Plaintiff (Respondent)

v.

LEE PAK YIN
LIM SENG FOOK } **Defendants (Appellants)**

LIEW NYUN YIN (f) Defendant (Respondent)

[PERAK CIVIL APPEAL No. 6 of 1939]

[PERAK CIVIL SUIT No. 86 of 1939]

Partnership — interim Receiver — continuance of appointment of, until trial or further order.

To support an application in a partnership action for the continuance of the appointment of an interim receiver until trial or further order, substantial grounds must be shown to have existed for the continuance and the dissolution of the partnership by reason of the death of a partner or the subsistence of that partnership or the creation of a new partnership is not one of such grounds.

APPEAL from the order of Murray-Aynsley, J. dated the 13th June, 1939.

By an agreement dated 14th day of April 1935 Lim Seng Chew, Lim Siew Yin (the plaintiff), Liew Ngun Yin, the 3rd defendant and Lee Pak Yin, the 1st defendant, agreed to become partners in the firm of Kim Yin Mining Kongsi. Lim Seng Chew held largest number of the shares and, prior to his death, he was the Managing Partner of the firm. He died on the 25th November 1937. The 1st and 2nd defendants were the executors under his Will. The plaintiff was the widow and residuary legatee under the Will of the said deceased. The 3rd defendant was the plaintiff's sister and the wife of the 1st defendant. On the 24th April 1939 the plaintiff commenced this Suit claiming (1) a declaration that the partnership was dissolved as on the death of the said Lim Seng Chew, or, alternatively, an order decreeing a dissolution of the partnership, (2) a winding-up order, (3) appointment of a receiver and other consequential relief. On the 1st of May 1939 the plaintiff moved for an order appointing an interim receiver. The Motion was heard *ex-parte* by Terrell, J. and an order was made appointing Mr. Yeoh Cheang Kang to be interim receiver and manager of the business of the Kongsi. By the said order it was further ordered that notice thereof be given to the defendants and that notice of Motion be served on the defendants returnable on the 8th of May. The order was made on the ground set out in paragraph 6 of the plaintiff's supporting affidavit of the 1st of May that "since the institution of this suit defendant No. 1 has, I am informed and verily believe, stopped mining operation and the mine is in danger of being flooded." Thereafter several affidavits were filed on behalf of the defendants to the effect that the danger apprehended by the plaintiff was non-existent. The plaintiff filed an affidavit, not in reply to the allegations contained in the affidavits above mentioned, but setting out complaints against the 1st and 2nd defendants regarding their management of the accounts of the Kongsi. The matter came on for hearing before Murray-Aynsley, J. on the 13th June and the learned Judge made an order continuing the appointment of the Interim Receiver and Manager. Against this Order the 1st and 2nd Defendants appealed.

Braddell (*Ramani* with him) for Appellants.

Terrell J. made an Order *ex parte* appointing a Receiver on an application by the Plaintiff on the usual terms.

Such an Order can only be made in extraordinary circumstances.

The true rule is that a Court will never make an Order *ex parte*.

See *Piperno v. Harmston,* 3 T.L.R. 219 at 220 *per* Lindley J.

Also in *Re Connolly Bros. Ltd.,* (1911) 1 Ch. 731 at p. 742.

After the Order was served the Defendants filed Affidavits in answer.

Substantial allegation on the Affidavit in support of the Application by the Plaintiff was flooding of the mine and this was denied and proved to be false.

Plaintiff then filed an Affidavit in reply and referred to new matters of complaint. It has confused a partnership action with an administration action. We treated these new allegations as irrelevant before Murray-Aynsley, J. An Affidavit in Reply must be *in Reply. Allen,* Vol. 1 p. 16 Rule 17.

On the merits it is clear from the Will that the Testator contemplated that his businesses should be carried on.

Para. 3 of the Will. A direction to postpone conversion, is a power to carry on existing businesses. See *Re Crowther,* (1895) 2 Ch. 56. *Re Ball,* 1930 W.N. 111.

We submit that when Plaintiff swore her first Affidavit she was not acting *bona fide*.

Appointment of Receiver is an equitable remedy and the applicant must come with clean hands and complete good faith.

The effect of the Order of Murray-Aynsley, J. is to take the mine out of the hands of the executor. *Kerr* on Receivers 10th Edition p. 92.

In finding that the Partnership was dissolved the Court below has decided the main issue before defence.

The matter before Murray-Aynsley, J. was not a substantive application for a Receiver.

The only question was whether Terrell J's. order was to be affirmed.

Seenivasagam (*Ong* with him) for 1st Respondent.

I submit this Court is not reviewing Terrell J's. Order.

The matter before Murray-Aynsley, J. was a substantive application for a Receiver in which the Affidavit in reply was very relevant. The allegations in that affidavit are not denied.

On the merits partnership was dissolved by death. See *Braddell,* Vol. 2. 153. *Thomson v. Anderson,* 9 Eq. Cases, 523. *Daniell's* Chancery Practice (8th Edn.) 1462. *Smith v. Jeys,* 49 E.R. 433.

Though the Court below did not refer to the affidavit in reply and decided the matter outside that affidavit I am entitled to support the judgment on any grounds not necessarily on the grounds on which Murray-Aynsley, J. rested his judgment.

Rix for the 2nd Respondent:

The effect of the Order is to exclude me from the partnership business without a single allegation being made against me. My affidavit as to facts remains undenied.

On the law I adopt the argument for the appellant.

Braddell in reply:

The matter before this Court is not at large.

The real question is, was the order from Terrell J. properly obtained.

We contend that the Plaintiff got her Receiver upon a misstatement of fact.

The order of Murray-Aynsley J. only continues the appointment of the Receiver.

The order says so in so many words. Such an order can only be made on the original grounds in support of the application.

If the court below considered the Affidavit in reply relevant, it should have said so and given time to the appellant to file a further answer. The Court not having done so the Affidavit in Reply is irrelevant.

Gordon-Smith, Ag. J.A.—This was an appeal by the 1st and 2nd Defendants against the following order of Murray-Aynsley J. dated the 13th June 1939, viz

> "that the appointment of Yeoh Cheang Kang of Ipoh as Receiver and Manager pursuant to the order of this Court of the 1st day of May 1939, of the business of Kim Yin Mining Kongsi situated at Kampar be continued until Judgment in the suit or other order".

The Plaintiff commenced the suit by Plaint dated the 24th April 1939, in which, after setting forth certain averments, she prayed for—

"(a) a declaration that partnership was dissolved on the said 25th November 1937, or in the alternative that this Honourable Court may decree a dissolution of the said partnership.

(b) an order winding up the said partnership.

(c) the appointment of a receiver"

and other consequential orders. A translation of the alleged partnership agreement was attached to the Plaint.

A Notice of Motion dated the 1st May 1939, accompanied by supporting affidavits was filed by the Plaintiff and the Motion was heard, *ex parte* by Terrell J. on the same day. The order thereon was to the effect that Mr. Yeoh Cheang Kang was appointed interim Receiver and Manager of the business of the Kongsi.

It was further ordered that notice of such order be given to the Defendants and that notice of Motion be served on the Defendants returnable on the 8th May.

As stated, it is against the consequential order of Murray Aynsley J. continuing the appointment of the Receiver and Manager, that the 1st and 2nd Defendants have appealed.

It is abundantly clear that Terrell J. treated the matter as urgent and important in making such an order *ex parte,* the grounds for so doing being contained in paragraph 6 of the Plaintiff's supporting affidavit of the 1st May and which reads as follows:--

> "Since the institution of this suit Defendant No. 1 has, I am informed and verily believe, stopped mining operations and the mine is in danger of being flooded".

There were no other grounds set forth in this affidavit which would justify such an order being made *ex parte* and without notice.

It is desirable to set forth now, other matters which appear from the documents filed, before considering the grounds on which Murray Aynsley J. continued the appointment.

This Mining Kongsi, according to the agreement of the 14th February 1935, was formed by (a) Lim Seng Chew, (b) Lin Siew Yin, the Plaintiff, (c) Liew Ngun Yin, the 3rd Defendant and (d) Lee Pak Yin, the 1st Defendant, their respective partnership shares being (a) $78,000, (b) $6,000, (c) $6,000 and (d) $6,000. It will be seen, therefore, that Lim Seng Chiew was easily the largest shareholder and he was, prior to his death, what is known as, the Managing Partner. He died on the 25th November 1937, and under his will the Plaintiff, who is his widow, will eventually become entitled to two-thirds of the residue of his estate. The 3rd Defendant is the Plaintiff's sister and the wife of the 1st Defendant, and the 1st and 2nd Defendants are the executors of Lim Seng Chiew's will, the 1st Defendant already being a partner in the Kongsi but the 2nd Defendant is an entire stranger to the Kongsi, but was the deceased's brother. Under the Will, the date of distribution of the residue of the deceased's estate was to take place 5 years from the date of the testator's death. In the Will (dated 31st (*sic*) November 1931) there is the usual Trust for sale and conversion with a discretionary power to postpone the same and a direction to invest the residue in trustee securities.

Since the Testator's death, the partnership business of the Kongsi has been carried on by the Executors, vide paragraph 6 of the Plaint, and they are sued as such Executors and personally.

As a result of service of the Notice of Motion for the 8th May, upon the Defendants, the following affidavits were filed:—

(1) 3rd May 1939, by Chong Soeng Teik, the Hangkong of the Kongsi, to the effect that Plaintiff had instructed him on the 30th April that a new Kapala, Ng Toong, engaged by the 1st Defendant was not to be allowed to commence work and that work had ceased on the mine without her being notified and that no operations were to be commenced until matters had been settled. He deposed to the fact that there were still four coolies at the mine on the 29th and 30th April, to look after the pumps.

(2) 5th May 1939, by Ng Toong, the new Kapala above-mentioned and confirming and amplifying the statements of Chong Soeng Teik to the effect that Plaintiff had instructed that work was not to be carried on without her permission.

(3) 6th May 1939, by the 3rd Defendant, confirming the above statement and replying to other allegations of the Plaintiff. She also stated that the small staff employed on the pumps was quite sufficient to guard against the mine being flooded and that there was no danger in this respect.

(4) 6th June 1939, by 1st Defendant Lee Pak Yin. In this lengthy affidavit the Deponent deals with various allegations made by the Plaintiff in regard to partnership and administration matters but the really relevant paragraph is No. 6 which replies in detail on the question of cessation of work and the danger of the mine being flooded. It is clear from this paragraph that the statement made by the Plaintiff in paragraph 6 of her affidavit was misleading and that there was no such danger, and it is extremely doubtful whether, had Terrell J. been in possession of these facts, he would have appointed an interim receiver on the application before him. This Deponent also stated, *inter alia,* that the attitude of the Plaintiff was unreasonable and the reason for the proceedings was due to family quarrels and that he was willing to give security for the proper running and management of the mine.

(5) 7th June 1939, by the Plaintiff. In this affidavit, the Plaintiff makes no reply whatsoever as to there being no danger of the mine being flooded but makes other and detailed allegations against the 1st and 2nd Defendants, not only as to their management of the accounts of the Kongsi but also as to the administration of her husband's estate, which is an entirely separate matter and is irrelevant to the question of a receiver.

This was the position as it came before Murray-Aynsley, J. on the hearing of the Motion.

The argument before him appears to have been brief and directed mainly as to whether the partnership was still subsisting or not and in the grounds of Judgment he states "The grounds for the order in Chambers are the same as for that in Civil Suit No. 85/39" but what this refers to is not clear. He then states

> "The order for a receiver was based on the dissolution of the partnership caused by the death of a partner. There was no evidence produced of any new partnership. In the circumstances it appeared to be in accordance with the usual practice to make the appointment",

and the formal order on this decision, after referring to the order of Court of the 1st May, orders that the receivership created thereunder "be continued until Judgment . . ."

I have no hesitation in saying that it has been clearly shown subsequently that the grounds put forward before Terrell J. in support of the application for an immediate and urgent appointment of an interim Receiver have not been substantiated and that on the information contained in the subsequent affidavits and in this respect, such interim Receiver should be discharged.

However, as I understand the argument before us, it was submitted on behalf of the Plaintiff (Respondent) that the order made by Terrell J. was not now under review and that the point before Murray Aynsley J. was as to the substantive appointment of a receiver to wind up a partnership business which had already been terminated by the death of one of the partners. This does not appear to accord with the actual order made which continued the appointment of an *Interim* Receiver, nor with the Judge's notes of the argument before him as it is clearly stated that Mr. Ramani submitted that the order, (i.e. the order appointing an Interim Receiver), should be discharged.

The question of the dissolution of the partnership by reason of the death of Lim Seng Chiew, or the subsistence of that partnership subsequently, or the creation of a new partnership, are all issues to be decided at the hearing of the suit and are not matters for decision on an interlocutory application. Moreover, although possible grounds for the appointment of a receiver are disclosed in the affidavit in reply filed by the Plaintiff, these have not been replied to by the Defendants and could not be replied to, without the leave of the Court. It was further argued that no reply was required to these further allegations as they were not relevant to the matter before the Court, which was, the continuance or discharge of the Receivership which had been made on an urgent and *ex parte* application, without notice.

It seems to me that at the hearing of the motion before Murray-Aynsley, J. on the 13th June, the position was misconceived both by the Plaintiff and by the learned Judge. The question before him then was not the question of the existence or the continuance or determination of the partnership on or subsequent to the death of Lim Seng Chiew, which are matters for consideration at the hearing of the suit, but the continuance or otherwise of the appointment of the Interim Receiver appointed by Terrell J. and the grounds for such continuance. As I have shewn, substantial grounds for the continuance of

the appointment of an Interim Receiver did not exist, and in fact had never existed.

For these reasons, I think that the Interim Receiver should then and there, have been discharged.

For the reasons given above, I also think that, even if one could accede to the argument for the Plaintiff before us that the point considered by Murray-Aynsley, J. was the appointment of a substantive Receiver, then there were insufficient grounds or material before the learned Judge for such substantive appointment being made.

Not only had the Plaintiff made allegations against the 1st and 2nd Defendants which had not been replied to, but some of those allegations were not relevant to the partnership issue. Moreover, the Plaintiff is only one of several partners and all the other partners object to the appointment of a Receiver, Interim or otherwise.

In my opinion, however, the question of substantive appointment of a Receiver is not properly before the Court and cannot be acceded to and the order continuing the appointment of the Interim Receiver should be discharged as also the order of Terrell J. making such appointment. This, however, should be without prejudice to the right of the Plaintiff to make any further application in this respect as she may think fit.

In allowing this appeal, there should be an order to such effect and the orders of Terrell J. of the 1st May and that of Murray-Aynsley, J. of the 13th June, should be discharged. The Interim Receiver should be ordered to account for the period of his Receivership and there should be an Inquiry as to the damages suffered in consequence of such appointment, the amount to be paid to the Defendants in accordance with the undertaking by the Plaintiff contained in the order of Terrell J. The Plaintiff will also have to pay the costs of the proceedings before Terrell J. and Murray-Aynsley, J., and as regards this appeal the plaintiff will also have to pay the Appellants' costs and there will be a certificate for two Counsel. The 2nd Respondent supported the appeal; there will be no order for costs against her.

Poyser, C.J.—I concur.

McElwaine, C.J. (S.S.)—I concur.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) &

GORDON-SMITH, Ag. J.A.

August 25, 1939.

ABDUL MORMIN v. PUBLIC PROSECUTOR.

[PERAK CRIMINAL APPEAL No. 12 of 1939]

Criminal Procedure Code (Cap. 6) Section 173—Plea of guilty—Magistrate's discretion as to permitting withdrawal of plea.

Until the Court is functus officio, it can in a proper case reject a plea of guilty which it may have accepted. It is in the discretion of the Court whether or not to allow such a plea to be withdrawn. That discretion must be exercised judicially.

This was a rehearing before the Court of Appeal under section 45A of the Courts Enactment (Cap. 2) of an appeal against the decision of a magistrate. The facts sufficiently appear from the judgment.

K. M. Coomarasamy for the Appellant.

T. V. A. Brodie, Deputy Public Prosecutor for the Respondent.

The Judgment of the Court was as follows:—

The Legal Adviser gave his certificate that this is a fit case for appeal from the Judgment of Mr. Justice Musa dismissing the appellant's appeal from his conviction and sentence on his plea of guilty to a charge of voluntarily causing grievous hurt tried before Mr. P. F. Y. Radcliffe, Magistrate at Ipoh.

On the 27th May, 1939, the charge was read and explained to the accused both in Hindustani and in Malay and in both languages he pleaded guilty. In Hindustani he said "I hit my wife with a stick."

The Magistrate postponed sentence to the 30th May to enable the wife to be present in the hope that some expression of regret might be made.

On the 30th Mr. Coomarasamy appeared for the accused and asked to withdraw the plea of guilty, the accused stating "she got her injuries by falling down".

This latter statement was at variance with that previous statement "I hit her with a stick" and his plea of guilty, and the Magistrate refused to allow the plea of guilty to be withdrawn and he sentenced the appellant to three months' R.I.

This appeal is against the Magistrate's refusal to allow the plea of guilty to be withdrawn.

At the conclusion of the argument we dismissed the appeal and we now give our reasons for so doing.